ID Engineering (M) Sdn Bhd v Goldpage Assets Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22C-11–07 OF 2015
SEE MEE CHUN J
29 FEBRUARY 2016

Building and Construction Law — Construction contracts — Claim for payment — Works duly completed — Claim for progress payment and retention sum premised on statement of final account — Whether statement of final account valid — Whether plaintiff entitled to payment

Civil Procedure — Affidavit — Admissibility — Affidavit filed after affidavits had been closed — Whether affidavit to be expunged

Civil Procedure — Preliminary question of law — Disposal of case on point of law — Claim for payment under construction contract — Whether statement of final account valid — Whether plaintiff entitled to payment — Whether proper case to be decided under O 14A of the Rules of Court 2012 — Rules of Court 2012 O 14A

The plaintiff had been appointed by the defendant as the contractor for a project by way of letter of award. The scope of work was agreed to be preliminary, building and mechanical and electrical. Certificate of completion and compliance was issued that contract work had been completed on 24 October 2012. The certificate of practical completion ('CPC') was issued certifying the work was completed to architect's satisfaction and taken into possession on 15 April 2013. This was then followed by certificate of making good defects. The plaintiff brought this claim against defendant for the sum of RM756,197.32 and the payment of second moiety retention of RM354,748.24. Its claim was premised on a statement of final account dated 25 January 2015 prepared by the quantity surveyor ('QS') and signed by the superintending officer ('SO') who was also the architect. The defendant resisted the claim on the grounds that the statement of final account was not valid as it had not been duly signed by SO and not supported by the relevant architects instructions ('AI') and/or engineers' instructions ('EI') for variation orders ('VO'). The plaintiff applied pursuant to O 14A of the Rules of Court 2012 for the disposal of the case on a point of law.

Held, allowing the application:

(1) The architect had endorsed the statement of final account and was now trying to change its stance by stating it had not done (see para 12).

(2) The contention that the final statement of account showed the final contract sum to be RM14,189,929.58 as running counter to the nature of a lump sum contract was contradicted by the defendant's own statement of revised final account prepared on 4 September 2015 of RM9,834,619.69. The court referred to cl 30.11(a) of PAM 2006 where the final account of the work shall show the adjustment made to the contract sum (see para 14); *Green Nurture Sdn Bhd v Wing Onn Engineering Sdn Bhd* [2015] 9 MLJ 39 referred.

(3) The defendant had attempted to introduce the affidavit of architect that he had not endorsed or signed the statement of final account. The court accepted the plaintiff's objection and expunged the affidavit on the ground that affidavits had been closed and this affidavit had raised new issues (see para 15).

(4) As to whether the VOS were supported by EIs and/or AIs, the architect's internal document acknowledged all the VOs; interim certificate No 13 whereby they acknowledged VOs and architect's letter of 4 February 2015. These documents coupled with plaintiff's supplementary affidavit which attached the AIs ordering variation put paid to defendant's contention they were no such supporting documents (see para 16).

(5) The final statement of account was signed by architect. As it showed a final contract sum of RM14,189,929.58 it followed that 5% of retention sum was RM709,496.179, out of which 2.5% was RM354,748.24. This was the amount for which plaintiff was entitled to (see para 17).

(6) This was a proper case to be decided under O 14A as the January statement of final account had been signed by architect and the VOs in question had been supported by the relevant documents (see paras 18–19); *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd & Ors* [2014] 6 MLJ 31 referred.

[Bahasa Malaysia summary

Plaintif telah dilantik oleh defendan sebagai kontraktor bagi projek melalui surat award. Skop kerja dipersetujui permulaan, bangunan dan mekanikal dan elektrik. Sijil perakuan siap dan pematuhan dikeluarkan bahawa kerja kontrak telah siap pada 24 Oktober 2012. Sijil penyiapan praktikal ('CPC') dikeluarkan mengesahkan kerja telah disiapkan kepada kepuasan arkitek dan telah diambil milikan pada 15 April 2013. Ini kemudiannya diikuti oleh sijil perakuan memperbaiki kecacatan. Plaintif menuntut tuntutan ini terhadap defendan bagi jumlah RM756,197.32 dan bayaran pengekalan moieti kedua sebanyak RM354,748.24. Tuntutannya adalah berdasarkan ke atas pernyataan akaun muktamad bertarikh 25 Januari 2015 yang disediakan oleh juruukur bahan ('JB') dan ditandatangani oleh pegawai penguasa ('PP') yang juga adalah arkitek. Defendan menentang tuntutan tersebut atas alasan bahawa pernyataan akaun muktamad tidak sah kerana ia tidak ditandatangani oleh PP dan tidak

disokong oleh arahan-arahan arkitek-arkitek ('AA') dan/atau arahan-arahan jurutera-jurutera ('AJ') yang relevan untuk perintah-perintah pelbagai ('PP'). Plaintif memohon berikutan A 14A Kaedah-Kaedah 2012 bagi perlepasan kes atas poin undang-undang.

Diputuskan, membenarkan permohonan:

(1) Arkitek telah mengendorskan pernyataan akaun muktamad dan sekarang mencuba untuk menukar pendiriannya dengan menyatakan ia tidak dibuat (lihat perenggan 12).

(2) Hujahan bahawa pernyataan akaun muktamad menunjukkan jumlah kontrak muktamad adalah sebanyak RM14,189,929.58 sebagai bertentangan kepada sifat kontrak sekaligus adalah bertentangan dengan pernyataan sendiri defendan terhadap akaun muktamad yang disemak disediakan pada 4 September 2015 sebanyak RM9,834,619.69. Mahkamah merujuk kepada klausa 30.11(a) PAM 2006 di mana akaun muktamad kerja akan menunjukkan pembetulan dibuat kepada jumlah kontrak (lihat perenggan 14); *Green Nurture Sdn Bhd v Wing Onn Engineering Sdn Bhd* [2015] 9 MLJ 39 dirujuk.

(3) Defendan telah mencuba untuk memperkenalkan afidavit arkitek yang dia tidak endors atau menandatangani pernyataan akaun muktamad. Mahkamah menerima bantahan plaintif dan membatalkan afidavit atas alasan bahawa afidavit-afidavit telah ditutup dan afidavit ini telah membangkitkan isu-isu baru (lihat perenggan 15).

(4) Mengenai sama ada PP disokong oleh AJ dan/atau AA, dokumen dalaman arkitek menerima kesemua PP; sijil interim No 13 yang dengannya menerima PP dan surat arkitek bertarikh 4 Februari 2015. Dokumen-dokumen ini bersama afidavit tambahan plaintif yang melampirkan AA yang memerintah pelbagai menangani hujahan defendan yang ianya tidak terdapat dokumen-dokumen sokongan sedemikian (lihat perenggan 16).

(5) Pernyataan akaun muktamad ditandatangani oleh arkitek. Memandangkan ia menunjukkan jumlah kontrak muktamad sejumlah RM14,189,929.58 dengan itu 5% jumlah pengekalan adalah RM709,496.179, yang mana daripada 2.5% adalah RM354,748.24 ini adalah jumlah yang plaintif berhak kepadanya (lihat perenggan 17).

(6) Ini adalah kes betul untuk diputuskan di bawah Kaedah 14A memandangkan pernyataan Januari akaun muktamad telah ditandatangani oleh arkitek dan PP yang dipersoalkan telah disokong oleh dokumen-dokumen relevan (lihat perenggan 18–19); *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd & Ors* [2014] 6 MLJ 31 dirujuk.]

Notes

For a case on admissibility of affidavit, see 2(1) *Mallal's Digest* (5th Ed, 2015) para 408.

For cases on construction contract in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 4044–4050.

For a case on preliminary question of law, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 7681.

Cases referred to

Green Nurture Sdn Bhd v Wing Onn Engineering Sdn Bhd [2015] 9 MLJ 39, HC (refd)

Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals [2014] 6 MLJ 31, FC (refd)

Legislation referred to

Rules of Court 2012 O 14A

Mohd Fakri (Mohd Azwar with him) (Azwar & Partners) for the plaintiff.
Sitha Latchumy (Sitha Murugiah & Co) for the defendant.

See Mee Chun J:

PARTIES AND CLAIM

[1] The plaintiff had filed a claim dated 29 May 2015 against the defendant for the sum of RM756,197.32 and the payment of second moiety retention of RM354,748.24. Its claim is premised on a statement of final account dated 25 January 2015 prepared by the quantity surveyor ('QS') and signed by the superintending officer ('SO') who is also the architect. The defendant resisted the claim as the statement of final account was not valid as it had not been duly signed by SO and not supported by the relevant architects, and/or engineers' instructions for variation orders ('VO').

[2] Enclosure 9 is the plaintiff's application pursuant to O 14A of the Rules of Court 2012 for the disposal of the case on a point of law for, inter alia, the following relief:

(a) Deklarasi bahawa Penyata Akhir Kewangan yang dikemukakan pada 23–1–2015 adalah sah di sisi Undang-Undang terpakai dan terkuatkuasa sebagaimana garis panduan PAM;

(b) Deklarasi bahawa berdasarkan kepada Penyata Akhir Kewangan, Defendan adalah berhutang kepada Plaintif Pembayaran ke atas baki kerja wang berjumlah RM756,197.32;

(c) Deklarasi bahawa Defendan melalui konsultan yang dilantik telah gagal mematuhi garis panduan PAM khususnya klausa 30.13 apabila sepatutnya menyediakan Sijil Akhir dalam tempoh 28 hari daripada pengeluaran CMGD;

(d) Satu Perintah mengarahkan Defendan melalui konsultan yang dilantik iaitu Juruukur Bahan dan Arkitek menyediakan Sijil Akhir (Final Certificate) dalam tempoh masa 30 hari daripada tarikh Perintah ini dan kegagalan melakukan demikian maka jumlah yang dinyatakan di dalam Penyata Akhir Kewangan 23–1–2015 adalah satu jumlah hutang yang mutlak dan muktamad serta melayakkan Plaintif untuk meneruskan proses perlaksanaan di atas jumlah tersebut;

(e) Defendan hendaklah membayar untuk pembayaran 2.5% wang tahanan '2nd moiety retention' berjumlah RM354,748.24

... .

[3] The plaintiff had been appointed by the defendant as the contractor for a project *Pembinaan Sebuah Pasaraya 1 Tingkat Berserta 1 Tingkat Mezzanine Di Atas Sebahagian Lot 619, Mukim Kuala Selangor Dan Kampung Pasir Penambang, Daerah Kuala Selangor, Selangor*. This was by way of letter of award dated 30 March 2012 ('LA SEH1'). The contract sum of RM18.955m was subsequently reduced to RM8.25m and the scope of work was agreed to be preliminary, building and mechanical and electrical (paras 4, 7 and 8 of affidavit in support encl 10). The reduction of contract sum was by way of supplementary letter of award dated 30 March 2012 ('THS1').

[4] Certificate of completion and compliance ('CCC') dated 12 June 2013 was issued that contract work had been completed on 24 October 2012 ('SEH5'). Certificate of practical completion ('CPC') was issued certifying the work was completed to architect's satisfaction and taken into possession on 15 April 2013 and that defects liability period will end on 14 October 2014 ('SEH6'). This was then followed by certificate of making good defects dated 22 December 2014 ('SEH8').

FINALITY OF FINAL ACCOUNT OF JANUARY 2015

Whether signed by architect

[5] As per the plaintiff statement of final account in SEH3 it shows the following:

Original Contract Sum:	RM 8,250,000.00
Revised Contract Sum (Including Addendum 1,2 & 3):	RM 8,491,162.70
1.0 Nomited Sub-Contractor	

a) Nomited Sub-Contractor (Addition):	RM 3,549,600.00
a) Domestic Sub-Contractor (Addition):	RM 1,236,139.00
b) Nomited Sub-Contractor (Omission):	RM (153,000.00)
2.0 Variation Order for Building Works	
a) Main Contract (Addition):	RM 1,316,880.68
b) Main Contract (Omission):	RM (250,852.80)
Final Contract Sum:	14,189,929.58
Less:	
1.0 Amount previously paid to the contractor ID ENGINEERING (M) SDN BHD (See Summary of Progress Payment Received)	RM 13,078,984.02
2.0 Second Moiety Retention (2.5% of Final Contract Sum)	RM 354,748.24
AMOUNT DUE TO ID ENGINEERING SDN BHD	RM 756,197.32

Six copies had been sent by QS from JUB Sekutu Sdn Bhd vide letter dated 23 January 2015 to the plaintiff (SEH1 to encl 10).

[6] As per para 10(a) and (b) of the defendant's affidavit in reply, encl 10, statement of final account was not valid as it had not been signed by the architect, the defendant the client or engineer and not supported by the engineer's instructions ('EI') and/or architect's instructions ('AI') to the VOs. By letter dated 15 July 2015 ('SEH12') the architect had stated it had not certified the final account. The defendant also states the statement of final account contradicts interim certificate No 13 in THS2. By letter dated 4 February 2015 the architect had rejected the final account and the defendant had similarly done so by letter dated 6 December 2015 ('THS4'). There followed meetings to finalise the final account. On 4 September 2015 a draft final account was prepared by QS and sent to the plaintiff for its approval ('THS5'). That final contract sum in THS5 was RM9,834.619.69 and the amount due to the plaintiff was RM20,056.60.

[7] The defendant further asserts as this was a lump sum contract the revised contract sum of RM8.25m could not adjusted in any way except than in accordance with contract. With reference to the architect signing the statement of final account the plaintiff states in its affidavit in response, encl 18 that:

20(b)(ii) Defendan sendiri telah mengakui bahawa Arkitek telah tandatangan sebenarnya sebagaimana dinyatakan di dalam Pernyataan Pembelaan perenggan 8 Cuma Defendan cuba menutup fakta ini kononnya Arkitek telah tersilap tandatangan. Namun Plaintif berjaya mendapatkan salinan yang bertandatangan dan telah diconteng tersebut. Maka kini, pengataan Defendan di perengan 12(g) adalah bertentangan dengan perenggan 8 Pernyataan Pembelaan;

(iii) Saya kemukakan pengataan di perenggan 8 Pernyataan Pembelaan sepertimana berikut:

> 8 ... Di mana mulanya Arkitek pada mulanya arkitek telah dengan tidak sengaja menandatangani satu mukasurat daripada Penyata Akhir Akaun ...

The statement of final account with signature 'dipadamkan' is in SEH1 to encl 18.

[8] With reference to lump sum nature, the plaintiff states no formal agreement was signed but the LA and supplementary LA to which there is a provision the prices and rates in BQ shall be scrutinised and adjusted but the final contract sum shall remain unchanged.

[9] Interim certificate No 13 had been signed by one Nik Nurabida who is not the QS appointed for the project and not duly authorised to sign interim certificates.

[10] In its affidavit in reply (1) encl 25, the defendant states there is no conflict in that architect had so signed the final statement of account as para 8 of its defence pleaded 'pada mulanya arkitek telah dengan tidak sengajanya menandatangani satu muka surat daripada penyata Akhir Akaun dan seterusnya menarik balik tandatangannya dengan menconteng tandatangan ... '. On interim certificate No 13 it is stated in para 9 that this interim certificate is from defendant's record.

[11] As to whether the architect had signed the January final statement of account, it was always the plaintiff's case it had been so. In para 8 of defence it was pleaded:

> Penyata Akhir Akaun itu tidak ditandatangani oleh jurutera atau akitek. Di mana pada mulanya arkitek telah dengan tidak sengaja menandatangani satu muka surat daripada Penyata Akhir Akaun dan seterusnya menarik balik tandatangannya dengan menconteng tandatangan apabila mendapati Penyata Akhir Akaun antara lain juga tidak disokong dengan peritah variasi ('variation order') yang disokong dengan arahan jurutera ('engineers instruction') dan/atau arahan arkitek ('architects instructions') dan disahkan oleh Defendan/klien.

In its affidavit in reply defendant ('encl 11'), it is affidavit:

> 10(a) Penyata Akhir Kewangan adalah tidak sah. Penyata akhir kewangan tidak ditandatangani oleh akitek, Defendan/klien atau jurutera. Melalui surat arkitek bertarikh 15-7-2015 telah pun mengesahkan bahawa mereka tidak mengesahkan Penyata Akhir Kewangan ...

The defence and affidavit in reply appears to be at cross purpose. The defence had stated the architect had inadvertently signed one page and then 'menarik balik tandatangannya dengan menconteng tendatangan' whereas in the affidavit is stated the architect had not signed. The plaintiff in its affidavit in response in encl 18 attached two signed copies by the architect which were 'dengan menconteng tandatangan'.

[12] The above thus shows that the architect had endorsed the statement of final account and is now trying to change its stance by stating it had not done. The fact of six copies of the statement of final account being sent to six copies of the statement of final account being sent to the plaintiff would support the fact that tje architect would have signed to endorse it. As per cl 30.10(a) of the PAM 2006 Standard Form of Building Contract (Without Quantities):

> 30.10 (a) If nothing in the said Final Account is disputed by the Employer or Contractor within three (3) Months from the date of receipt of the Final Account from the Architect, the Final Account shall be conclusive and deemed agreed by the parties.

[13] With regard to the defendant's contention it had disputed the statement of final account when the architect had by letter dated 4 December 2015 rejected it and so too had the defendant by letter dated 6 February 2015 ('THS4'), this was at best copied to the plaintiff. The series of meetings referred to did not involve plaintiff. The earliest direct letter to plaintiff was dated 15 July 2015 (by the architect) and 4 August 2015 (by QS), THS4, pp 20 and 21.

[14] The further contention that the final statement of account shows the final contract sum to be RM14,189,929.58 as running counter to the nature of a lump sum contract is contradicted by the defendant's own statement of revised final account prepared on 4 September 2015 of RM9,834,619.69 ('SEH9'). Reference is made to cl 30.11(a) of the PAM 2006 where the final account of the work shall show the adjustment made to the contract sum. In *Green Nurture Sdn Bhd v Wing Onn Engineering Sdn Bhd* [2015] 9 MLJ 39 the court had also considered:

> *CM Indah Sdn Bhd (dahulunya dikenali sebagai Chai Mio Constructions Sdn Bhd) v UB Usahabina Sdn Bhd* [2006] MLJU 426 where the court held as follows:
>
> ...

> Although the lump sum is always the starting point, it is comparatively rare for the price the contractor is entitled to receive at the end of the day to be exactly the same as the lump sum. The lump sum is usually subject to adjustment for extra work, fluctuations sub-contractor and so on.
>
> ...

[15] The defendant had attempted in encl 27 dated 9 November 2015 to introduce the affidavit of the architect that he had not endorsed or signed the statement of final account. This court had accepted the plaintiff's objection and expunged the affidavit on the ground it was close of affidavits and had raised new issues.

Whether supported by Els and Als

[16] As to whether the VOs were supported by Els and/or Als, reference is made to the architect's internal document in THS4, encl 11, pp 5–7 whereby it had acknowledged all the VOs; interim certificate No 13 ('THS3') whereby they acknowledged VOs and the architect's letter of 4 February 2015 where they had asked for verification of seven VOs. These documents coupled with the plaintiff's supplementary affidavit (1) in encl 21 which attached the Als ordering variation puts paid to the defendant's contention they were no such supporting documents.

SECOND MOIETY RETENTION SUM

[17] The final statement of account was signed by the architect. As it shows a final contract sum of RM14,189,929.58 it follows that 5% of retention sum is RM709,496.179, out of which 2.5% is RM354,748.24. This is the amount for which the plaintiff is entitled to.

THE PLAINTIFF'S APPLICATION SUITABLE FOR DETERMINATION UNDER O 14A

[18] In *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31 it is stated at p 50 as follows:

> [36] it is well settled that an issue is only suitable for determination under O 14A if the points of law to be determined there under have been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter (see *Allen v Gulf Oil Refining Ltd* [1980] QB 156 and *Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd* [2008] 2 CLJ 686). The trial judge is therefore vested which the discretion to rely on the pleadings or to rely on affidavit evidence before him to determine whether the matter is suitable for determination without full trial of the action (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*).

CONCLUSION

[19] Under the circumstances this was a proper case to be decided under O 14A as the January statement of final account had been signed by the architect and the VOs in question had been supported by the relevant documents. Enclosure 9 was therefore allowed.

Application allowed.

Reported by Kanesh Sundrum